

STATEMENT TO OIRA ON CVPIA BPGS

JANUARY 4, 2021

Areas of Support for the Business Practices Guidelines

- **Support for Reclamation's openness and engagement of stakeholders.** Reclamation has engaged multiple stakeholders in an extremely open process to resolve long-standing uncertainties related to Central Valley Project Improvement Act (CVPIA) accounting practices. Reclamation did not universally accept water user requests, and there are still areas where groups disagree; however, we believe the agency's process was fair and transparent. While we have not seen the final draft of the Business Practice Guidelines (BPGs) or redline version of the CVPIA implementation guidelines since comments were requested September 4, 2020, we appreciate Reclamation's demonstrated leadership in confronting challenging and long-standing uncertainties and increasing transparency regarding its process and decision-making. (See also: Oct. 16, 2020 statement of Friant Water Authority, San Luis & Delta-Mendota Water Authority, and Tehama Colusa Canal Authority.)
- **Support for development of the BPGs and resolution of outstanding issues.** Many of the issues Reclamation is addressing through the BPGs have remained unresolved since passage of the CVPIA in 1992. Clarification and resolution of these issues is long overdue. Further, a recent court decision (*NCPA v. United States*), necessitates revision of Reclamation's cost allocation process relative to "proportionality" under the CVPIA.
- **Support for the allocation of costs under CVPIA section 3406(b)(19).¹** Reclamation correctly concludes that costs associated with Section 3406(b)(19)—assisting the State of California with fish screens—are not reimbursable. Section 3406(b)(19) directs the Secretary to "[A]ssist the State of California" in efforts to avoid juvenile anadromous fish losses resulting from unscreened or inadequately screened river and stream diversions. The section further states that the "[S]ecretary's share of costs... shall not exceed 50 percent of the total cost of any such activity."² The "Secretary's share of costs" establishes that the costs incurred under this section are to be allocated to the Secretary, not to water and power users. Additionally, fish screen costs specific to CVP-related project facilities identified in sections 3406(b)(4), 3406(b)(5), and 3406(b)(18)³—immediately prior to 3406(b)(19)—have specific cost-share authorities listed in their respective subsections. These shares range from 37.5% reimbursable (as main project features)/37.5% non-reimbursable/25% state share, to 75% non-reimbursable federal share/25% state share.

It appears from the above that Congress made a distinction in the treatment of costs between CVP project-related fish screens and helping the State of California with efforts to avoid juvenile anadromous fish losses elsewhere in the Sacramento, San Joaquin, and Delta watersheds, and that those costs should be split between the federal and state governments with no more than 50% shared by the federal government (i.e., Secretary). This cost-share language, as well as the specific

¹ Originally, section 3406(b)(21)—prior to WIIN Act amendments, which resulted in reordering the section.

² P.L. 102-575, Title 34; Section 3406(b)(21), now 3406(b)(19).

³ Formerly 3406(b)(20).

cost-share language in preceding sections, leads to the conclusion that if Congress had meant for the Secretary's portion in section 3406(b)(19) to be reimbursable, it would have said so. (See: Friant Water Authority comment letter on BPGs, February 14, 2020.)

- **Support for the allocation of costs under CVPIA Section 3406(b)(1) on non-CVP facilities and streams.** Earlier BPGs for the CVPIA⁴ note that "Reclamation has no authority to recover costs associated with non-project activities or non-reimbursable project activities" and references "Mid-Pacific Region Business Practices Guidelines, Determinations of Reimbursability, February 14, 2002." This practice should be continued as proposed in the revised BPGs.
- **Support for determination that costs for investigations, studies, etc. should not be allocated to all project purposes where the Act is silent on reimbursement.** A 1971 act, P.L. 92-149 (85 Stat. 416), states: "*all costs heretofore or hereafter incurred from funds appropriated to the Bureau of Reclamation ... for (1) investigations and surveys of potential projects... and (5) general engineering and research studies shall be nonreimbursable* (emphasis added)." There are several instances in the 2017 ECO report and the November 2019 draft BPGs that classified "investigations" (e.g., sections 3406(d)(6) and 3406(d)(6)(e)), studies (e.g., 3406(b)(9)), and data collection as reimbursable expenditures, even where the CVPIA statute is silent on cost allocations. Reclamation's Directives and Standards (D&S) published in the Reclamation Manual also reference P.L. 92-149 and appear at odds with classification of investigations under the 2017 ECO Report and the November 2019 BPGs proposal. The newly proposed BPGs changes would correct this prior misclassification. (See: D&S LND-01-01 re: P.L. 89-72 and reference to 75% federal cost share for fish and wildlife enhancement facilities.)
- **Support for the determination that costs for investigations, studies, etc. undertaken under CVPIA section 3406(b)(1) should not be identified as wholly reimbursable.** Section 3406(b)(1) directs the Secretary of the Interior to develop and implement a program (commonly referred to as the Anadromous Fish Restoration Program (AFRP)), including the fish doubling goal, and to also "address other identified adverse environmental impacts" of the CVP not specifically enumerated in the section, among other things. Section 3406(b)(1)(D) further notes that "[c]osts associated with this paragraph shall be reimbursable pursuant to existing statutory and regulatory procedures." One example of a statutory requirement existing at the time CVPIA was enacted is P.L. 92-149, as noted above.
- **Support for equal treatment of water and power pool credits.** Water and power Mitigation and Restoration (M&R) payments should be treated equally with respect to reimbursement obligations, not as proposed in the November 2019 draft BPGs.

Requested Changes to BPGs

- **Power collections should not disadvantage water users.** The *NCPA v. U.S.* decision of the U.S. Court of Appeals for the Federal Circuit mandates proportionality; however, section 3407(d)(2)(A) of CVPIA provides discretion as to how Reclamation might do so.

⁴ U.S. Dept. of the Interior, Bureau of Reclamation, *Business Practices Guidelines for Central Valley Project Improvement Act Program Accounting and Cost Recovery* (BRC 03-01 Sept. 29, 2003).

It is our understanding that Reclamation is proposing a 1-year timeframe with a 2-year lag. In our view, whatever basis is used for this assessment, it should be made clear that such a change will not in any way result in increased collections from or allocation of costs to water users.

- ***Ensure consistency between the power cost allocation and the 2020 CVP cost allocation study.*** Reclamation should ensure that any change to power cost allocations should: (1) be wholly consistent with the most recent CVP cost allocation study, and (2) not affect water user repayment obligations.

Areas Needing Further Clarification

- Reclamation should clarify what costs are for section 3406(b)(1) AFRP activities with regard to CVP-related facilities and operations vs. non-CVP related activities—in other words, what specifically goes into the 3406(b)(1) bucket for reimbursement? Understanding these details is especially important so that going forward, future water and power users can know and understand the basis for the costs allocated to 3406(b)(1) activities.